Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ELFIDA CHAVEZ,

Petitioner,

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Supreme Court.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court's strict interpretation and applicatin of Texas Appellate Rule 41(a)(1) deprived Petitioner of her Due Process Rights under the Fourteenth Amendment of the U.S. Constitution.

2. Whether the dismissal of Petitioner's appeal for want of Jurisdiction based on the strict application and interprestation of Texas Appellate Rule 41(a)(1) is arbitrary and irrational which essentially deprives Petitioner of Equal Protection under the Fourteenth Amendment of the U.S. Constitution.

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CERTIFICATE OF INTERESTED PERSONS

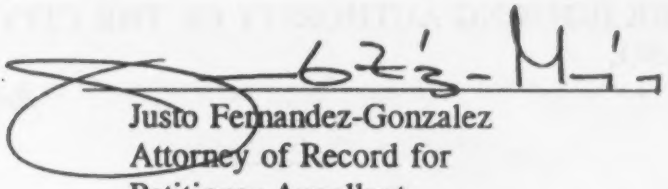
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representation are made in order that the Judges of this Court may evaluate possible disqualifications or refusal.

Elfida Chavez, Petitioner

Michael C. Crowley, trial and appellate attorney for Petitioner-Appellees

Edward W. Dunbar, appellate attorney for Respondents-Appellees

Justo Fernandez-Gonzalez, trial and appellate attorney for Petitioner-Appellants



Justo Fernandez-Gonzalez
Attorney of Record for
Petitioner-Appellant

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On Petition For Writ Of Certiorari
To The Texas Supreme Court.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ELFIDA CHAVEZ, respectfully petitions for a writ of certiorari to review the judgment of the Texas Supreme Court.

OPINIONS BELOW

The opinions of the Texas Court of Appeals (App., C, and D) are reported. 897 S.W.2d 523 (Tex.-App. El Paso, 1995) 876 S.W.2d 416 (Tex.App.-El Paso, 1994)

JURISDICTION

The Texas Supreme Court refused to grant Writ of error on October 12, 1995. (App., infra, B). Motion for rehearing was overruled by the Texas Supreme Court on November 22, 1995. (App. infra, A). The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texas Rules of Appellate Procedure, Rule 41(a)(1) provides in relevant part:

> 1. "When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after judgment is signed, or within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has filed a request for findings of fact and conslusions of law in a case tried without a jury. . ."

2. The Due Process and Equal Protection Clause of the Fourteenth Amendment of the Constitution.

STATEMENT OF THE CASE

Petitioner, ELFIDA CHAVEZ, is a Senior Citizen woman who resides in public housing. She has resided in public housing for almost a decade. Her invalid daughter and granddaughter live with her at the Kennedy Apartments. Her daughter is on a wheel chair and her granddaughter is in her tender years. They are facing eviction because the Housing Authority is holding her responsible for acts of misconduct allegedly committed by her twenty-five year old son who resides with her fiancee in another apartment, on the same complex.

The Housing Authority enacted a policy whereby a tenant can be evicted for acts of misconduct committed by guest or relatives on or near the projects. The Housing Authority is enforcing the eviction against her even though the son has not resided with her since 1989. The security guard for the Housing Authority testified in Federal Court that their son resided with his fiancee and children.

Petitioner did not commit any wrongdoing that would warrant eviction. Nonetheless, the Housing Authority filed a Forcible Entry and Detainer proceeding in Justice of the Peace Court.

A jury rendered a favorable decision for the Housing Authority; it was unknown that the son was residing with her

fiancee at the time of trial. She appealed to County Court; however, although she requested a Jury Trial, she was denied one; summary judgment was rendered against Petitioner based on the Collateral Estoppel Doctrine.

B. PROCEEDING BELOW

The trial court rendered a decision in favor of the Housing Authority based on the Doctrine of Collateral Estoppel. Chavez appealed to the Texas Eighth Court of Appeals with One point of error, challenging the County court's granting of summary judgment which apparently was based on Collateral Estoppel. The court of Appeals did not rule on point of error number one, and instead dismissed Petitioner's appeal for Want Of Jurisdiction after it had previously denied Respondent's Motion to Dismiss for Want of Jurisdiction. Both opinions were published. Petitioner filed a Motion for Rehearing.

Chavez motion for rehearing was granted on April 13, 1995; however, the Court of Appeals in a published opinion affirmed its decision to dismiss the appeal. A petition for writ of error to the Texas Supreme Court with three points of error was filed unsuccessfully; the court refused to grant Petitioner's writ of error. On November 22, 1995, the State Supreme Court overruled Petitioner's Motion for rehearing.

B. REASONS FOR GRANTING PETITION

Petitioner is seeking certiorari before this United

States Supreme Court to review a decision rendered by the Texas Court of Appeals and was subsequently approved by the Texas Supreme Court by denying Petitioner's request for Writ of Error[1].

The decision of the State Court conflicts with a longline of U.S. Supreme Court cases that require that if a state promulgates Appellate Rules, they must comport with the Requirements of Due Process and Equal Protection of Law under the Fourteenth Amendment of the Constitution. Moreover, the decision of the State Court represents a gross miscarriage of justice. Washington v. United States, 357 U.S. 348, (1958) and the dismissal of the Petitioner's appeal for want of jurisdiction based on the interpretation of inconsistent and incoherent appellate Rules had a "harsh impact" upon Petitioner, a senior citizen, public housing tenant, and her family. Montana v. Kennedy, 366 U.S. 308, (1961).

The Texas Courts have created more confusion for practitioners in their inconsistent and incoherent interpretation of Texas Appellate Rule of Procedure, Rule 41(a)(1).

The Rule as applied by the Texas Courts has "create[d] a serious risk of unfair loss of a right to appeal, because it is inconsistent. . ." Stone, v. Immigration and Naturalization Service, 514 U.S._, 131 L Ed 2d 465, 115 S Ct._, (1995) and through inadvertence practitioners may be

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[1]In Texas, one who seeks to alter a Court of Appeals decision must complain to the State Supreme Court by filing an application for writ of error.

subjected to dismissal for Want of Jurisdiction. Petitioner essentially was deprived of a forum to litigate her legal rights and protect her home; the dismissal For Want of Jurisdiction is clearly in violation of Petitioner's Constitutional rights under the Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

It is clear that the Constitution does not require states to establish an appellate review for those who had the opportunity to present their case on the merits. However, where a state chooses to enact laws that allows a person to seek appellate review of their case, the state cannot terminate that appellant's appeal right without complying with the minimum requirements of the due process clause of the Fourteenth Amendment.

For instance, In Griffin v. Illinois, 351, U.S. 12, the Court Stated:

> "It is true that a state is not required by the Federal Constitution to provide appellate Courts or a right to appellate review." Id. p. 18-20.

Consequently, the Supreme Court stated that where a state has enacted appellate review "proceedings in its Supreme Court are merely final steps in the Judicial process in trying cases and therefore cannot be conducted so as to deny the "Due Process" which the Fourteenth Amendment requires . . . the appeal was but a continuation, petition, defenses which began at trial." National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 45-47 (1954).

In National, supra, the Court was more concerned with a situation where the state did not allow appellate review where "[the Court] had deprived defendant of his property without due process of law by denying him his constitutional right to a day in Court." Id. U.S. 41-42. The opportunity to be heard on the merits is a requirement of the Due Process clause. This Court has emphasized its concern it has for State Courts to satisfy due process requirements.

"Our present concern is solely with the question whether plaintiff has been accorded due process in the primary sense whether it has had an opportunity to present its case and be heard in its support." Brinkerhoff - Faris Trust v. Hill, 281 U.S. 673, 681, (1930).

Similarly, in the case at bar, the Petitioner was not allowed the opportunity to present her case on the merits, and before a jury in the forcible entry and detainer action filed by the Housing Authority of El Paso. She will be evicted without due process, The County Court at Law rendered a summary Judgment against appellant based on what appeared to be the Doctrine of Collateral estoppel.[2] In the trial court, the Petitioner had requested a jury trial to show that the Housing Authority was unfairly accusing her of breaking the lease. She was never given the opportunity to be heard in her trial

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[2]**Collateral estoppel was applied to Petitioner's eviction proceeding because she tried her §1983 claims that she raised in a federal court complaint. The Federal Court case was limited to the Constitutional claims and not the breach of lease which was pending before County Court. See, *Chavez v. Housing Authority*, 973 F.2d 1245 (5th Cir., 1992).**

de Novo in County Court. Subsequently, when she sought review of the trial Court's summary judgment before the Texas Court of Appeals, where the Court of Appeals denied Respondent's Motion to Dismiss Appeal for Want of Jurisdiction. However, in a subsequent *sua sponte* motion the Court dismissed the case based on the Supreme Court strict interpretation Rule of Tex. R. App. p. 41(a)(1). Petitioner's "Due Process" rights have been denied at every proceeding. One must remember that "Due Process" is not an abstract concept. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that a deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mulane v. Central Hanover Bank, 339 U.S. 306, 313-315, (1950).

Hence, the State Supreme Court, by promulgating the Texas Appellate Rules in 1990, created and was obligated to provide litigants with due process on their appeals. The Federal guaranty of "due process" extends to state action, though its judicial, as well as through its legislative, executive, or administrative branch of government." Brinkerhoff, Faristrust v. Hill, 281 U.S. 673, 679 (1929).

Our judiciary cannot terminate Petitioner's "due process" rights by interpreting a rule in such an inconsistent, and irrational manner that forecloses the petitioner from prosecuting her appeal. "The violation is nonetheless clear when that result is accomplished by the State judiciary in the

courts [when] construing an otherwise valid state statute." Id. p. 679.

This state established procedures "essentially destroys the appellant's rights to an appellate review on the merits; the interpretation of the Court is incoherent, inconsistent, arbitrary and irrational. In Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982), Justice Blackmun stated that" due process is not diminished by the fact that the state may specified its own procedures that it may deem adequate . . ." cf. Vitek v. Jones, 445 U.S. 480, 491, (1980).

This Court should grant certiorari and review the Texas Appellate Rule and scrutinize how their inconsistent and irrational interpretation has deprived litigants of their Constitutional right to present their case on the merits. Briefly, the Texas Supreme Court has stated that if one seeks review of a trial Court Summary Judgement one has to file a Motion for New trial to extend the time to appeal from 30 days to 90 days. This is where the inconsistency comes in because if one files a request for Finding of Fact and Conclusion of law to extend the time to appeal, the Court has stated that it is improper because there was "no trial" in a summary judgment. It does not follow; a motion for new trial in a summary judgment is an impossibility because according to the Court "[a] case is 'tried' when there is an evidentiary hearing before the court upon conflicting evidence. See, Court decision, p. 2. Thus, how can a Motion for New trial be proper in a summary judgment situation if there was no trial, but not a request for findings

of fact and conclusion of law.

The first opinion by the Court of Appeals, Chavez, v. Housing Authority of El Paso, 876 S.W. 2d 416, (Tex. App.-El Paso, 1994), appears to comport more with the minimum requirements of due process in that it follows a more rational and less arbitrary application of Rule 41(a)(1); Post-judgment motions would allow the trial court judge the opportunity to alter, amend or modify his judgment and at same time extend the time to perfect an appeal. What one calls the Motion itself would not be strictly construed. Findings of Fact and Conclusion of Law would not preserve error; it would be analogous to a motion for new trial; this approach does follow the requirements of due process: "[w]hat the Fourteenth Amendment does require, however, 'is an opportunity . . . granted at meaningful time in a meaningful manner." Logan, supra, U.S. 437. cf Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

This Court, therefore, should grant certiorari to review the Texas Appellate statute and determine whether Texas application of the Rule is consistent with the minimum requirements of the Due Process Clause of the Fourteenth Amendment of U.S. Constitution.

Moreover, this Court should grant certiorari because the Dismissal of Petitioner's appeal for Want of Jurisdiction is also in clear violation of the Equal Protection Clause of the Fourteenth Amendment.

"For over a century, the Court has engaged in a continuing and occasionally metaphysical effort to identify the

precise nature of the Equal Protection's clause's guarantee." Logan, supra, p. 439, (1982); However, "[a]t the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweiker v. Wilson, 450 U.S. 221, 229, (1981).

Thus, when one scrutinizes a governmental rule or regulation, the focus should be on whether the disparate treatment is arbitrary and irrational and whether its purpose serves a rational governmental interest. "This Court still has an obligation to view the classification system in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." Rinaldi *v. Yeager, 384 U.S. 305, 308, (1966).*

This requirement is applicable to appellate review as well. "This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts. Rinaldi, supra, at p. U.S. 310.

The Texas State Supreme Court promulgated Appellate Procedure Rules; obviously, the Court never intended to classify litigants who are seeking review in the State's Court of Appeals in a manner that would result in invidious discrimination against some appellants. However, the approach taken by the Texas Supreme Court, for instance, in Linwood v. NCNB, 885 S.W. 2d 102, (Tex.

1994), and also by the Court of Appeals, opinion, in Chavez v. Housing Authority of El Paso, 897 S.W. 2d 523, (Tex. App.- El Paso, 1995), unnecessarily and unreasonably created distinctions among appellants that impedes them access to the court of appeal for review of their case on the merits.

The Texas courts have in essence, established two categories of appellants, those who cannot extend the timetable to perfect an appeal from thirty days to ninety days from the date that a summary judgment is signed and those who can extend the time because they submitted a motion for new trial or made a bona fide attempt to invoke the jurisdiction of this court.

This arbitrary interpretation by court is irrational; For instance, "Linwood, supra, filed his notice of appeals well within the thirty-day period after [the summary] judgment was signed." Linwood, supra at p. 103. However, the Rules do not require nor authorize notice of Appeal. Nonetheless, the Texas Court arbitrarily decided that said unauthorized filing of notice of appeal constitutes a "bona fide" attempt to invoke the jurisdiction of the Court. See, City of San Antonio v. Rodriguez, 828 S.W. 2d 417, (Tex. 1992) (per curiam); Grand Prairie Independent School District, 813 S.W. 2d 499 (Tex. 1990); Walker v. Blue Water Apartments, 776 S.W. 2d 578 (Tex. 1989).

However, those who filed timely request for findings of fact and conclusions of law lose their right to appeal "[b]ecause findings of fact and conclusions of law have no place in a summary judgment proceeding, the timetable was

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not extended." Linwood, supra, at p. 103. These appellants are not allow the opportunity to prosecute their appeal on the merits and the dismissal has a harsh impact on the litigant's appeal.

Thus two classifications of litigants seeking appeal have been created unintentionally by the strict construction and application of Rule 41(a)(1) by the Texas Courts; this situation is similar to Logan, supra, where "[o]n its face, Logan's equal protection claim is an unconventional one. "The Act §858(b) establishes no explicit classifications and does not expressly distinguish between claimants . . . As the Illinois Supreme Court interpreted the statute, however, §858(b) unambiguously divides claims - and Thus, necessarily claimants - into two discreet groups that are accorded disparate treatment. Claims processed within 120 days are given full consideration on the merits, and complainants bringing such changes are awarded the opportunity for full administrative judicial review." Id. p. 438 - 439.

We have a similar situation in the case at bar, it is an unconventional classification; however, the Court in its application and strict construction of Rule 41(a)(1) has created two different classes of appellants. Appellants, Petitioner who filed timely request for findings of fact and conclusions of Law within 20 days after the summary judgment has been signed lost her right to prosecute their appeal because a summary judgment is not a "trial" for purposes of a request for findings of fact and conclusion of law according to the Texas Court. The distinction does not

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make legal sense.

This Court cannot allow Texas to divide appellants into two distinct classes, or "classifications drawn by the statute inconsistent with the Fourteenth Amendment. Logan v. Zimmerman Brush Co., supra, U.S. p. 439.

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the subject of the legislation, so that all persons, similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76, (1971).

The Texas Supreme Court has created two classes of appellants and treats them unequally. Those who timely filed a Motion for a new trial; those who did not comply with the requirements of the Rule, but the court determines that by filing an instrument in good faith to invoke the jurisdiction of the Court, and, those who filed a timely request for findings of fact in conclusions of Law in a summary judgment proceeding; These distinctions do not serve a legitimate government purpose; the Court has not articulated a rational basis for this distinctions.

The mere fact that a request for findings of fact and conclusions of law have no place in summary judgment does not necessarily serve a legitimate governmental interest by creating a distinct class of appellants and drawing an arbitrary line and dismiss appeals where timely request for findings and conclusions of law have been made. ". . . neither a motion for new trial nor a request for findings of fact and conclusion of law is the proper post-judgment filing in a

summary judgment case." Chavez v. Housing Authority of El Paso, 876 S.W. 2d 416, 417, (Tex. App. - El Paso, 1994) (first court decision). Thus, "this situation is analogous to those where court of appeals have found that defective motion for new trial, although preserving nothing for review, nevertheless, extend time for perfecting appeal." Id. p. 417.

This Court should grant certiorari because the Texas application of the Rule had a harsh impact on Petitioner and her family and to allow the dismissal of her appeal based on an irrational interpretation and inconsistent and arbitrary technical application for appelate Rule, 41(a)(1), will result in a gross miscarriage of justice in violation of Due Process and Equal Protection Clauses under the Fourteenth Amendment of the U.S. Constitution.

C. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The interpretation of Rule 41(a)(1) of the Texas Appellate Procedure is inconsistent and does not provide the practitioner with a coherent view as to the steps necessary to assail a judgment of a trial court and the requirements necessary to perfect an appeal.

The Rule on its face appears to be consistent. However, when applied in summary judgment situations, the Rule is utterly inconsistent and not precise. On their final and third opinion concerning Chavez, supra, the Court of Appeals for Eight District of Texas, expressed its concern about the need to reconcile the conflicts that the Rule as

applied and interpreted by the Court has caused on practitioner. In Chavez v. Housing Authority of the City of El Paso, supra, the Justices discuss, in footnote number 1, what they believe to be the inconsistency with Tex. R. App. P. 41(a)(1). They stated as follows:

> "It is logical to note that based upon the definition of trial as contained in Linwood and Besing, a summary judgment proceeding has not been "tried" for purposes of a motion for new trial is not necessarily inappropriate following entry of summary judgment despite the fact that no trial was actually had . . . If findings of fact and conclusions of law are inappropriate to extend the timetable because a summary judgment does not constitute a "trial", we are hard pressed to understand how a motion for new trial is any more appropriate . . . Thus, the Rules are in apparent conflict . . . we do not believe that such hypertechnical approach fosters either justice or judicial economy. However, until these Rules are harmonized or definitively construed by the Supreme Court we advise caution."

The Court of Appeals held in their first opinion, Chavez v. The Housing Authority of El Paso, 876 S.W. 2d 416, (Tex. App. - El Paso, 1994) that Appellant's timely request for findings of fact and conclusions of law extended her time for filing the appeal bond, or affidavit in lieu, until ninety days after the judgment was signed. Initially, the Respondent's motion to dismiss motion for Want of Jurisdiction was denied. Id. p. 418. The Court's reasoning

for holding that timely request for Findings of Fact and Conclusions of Law extended the time to appeal was based on the fact that the Court "believe[d] that the label given a post-judgment pleading is not proper focus in deciding whether it extends the timetables set out in Tex. R. App. P. 41(a)(1). Rather, if the pleading either assails the judgment entered or (after a judgment by the court without a jury) requests that the court elaborate on the judgment factually or legally that is sufficient to enlarge the time for perfecting the appeal under Tex. R. App. p. 41(a)(1). Id. p. 418.

Subsequently, however, the same Court of Appeals had to dismiss the appeal for Want of Jurisdiction because the Texas Supreme Court rendered a decision concerning this very issue. In Linwood v. NCNB Texas, supra,. The Court of Appeals dismissed the appeal because "[i]n the instant cause Chavez filed a timely request for findings and conclusions; she filed no motion for new trial." Chavez, supra, at 525.

Justice Larsen, in her concurrent opinion reluctantly dismissed the appeal for Want of Jurisdiction, but felt that the Court was bound by the holding of the Texas Supreme Court in Linwood v. NCNB, Supra. However, Justice Larsen expressed her disagreement with the reasoning of the Texas Supreme Court in Linwood. She stated as follows:

> "It would be more consistent and rational to treat all post-judgment pleadings to assail that judgment, or seeking elaboration on it, as extending appellate deadlines. In my view, the technical questions of what legal effect a

> motion might have, whether "a trial" has been held, what a pleading is most appropriately named served only to create technical pitfalls." Chavez, supra, p. 528.

Justice Larsen concurrence makes sense, not because we're petitioners, but because her reasoning would make the interpretation of appellate Rule 41(a)(1) more consistent in that it would allow judges to alter, modify or elaborate more about the judgment and also it extends the time to appeal. The Court of Appeals, opinion, p. 4 expresses this concern. In footnote No. 1 they stated:

> "Thus, the Rules are in apparent conflict. The concept of opening the window to allow additional time for perfecting an appeal arises no doubt from the intention that a trial court have the ability to alter or withdraw its judgment during its plenary power. Chavez, supra. p. 526

If a losing party assails or seeks elaboration of the judgment, it allows the trial court judge sufficient time to reflect on the judgment and give him/her the opportunity to alter, amend, modify, reconsider, withdraw or elaborate in his/her judgment. Rule 41(a)(1) as written and interpreted by this court, does not serve said purpose. This court has articulated the purpose behind this Rule, as follows:

> "The rationale behind the tolling principle of the Rule is the same in traditional practice: "[a] timely petition for rehearing tolls the running of the [appeal] period because it

> operates to suspend the finality . . . of the Courts judgment pending the Court's final determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 267, (1978).

The Texas Appellate Rules, as written, fall short of this requirement; they do not serve said purpose. For instance, under the Rule, no procedure exist to allow the trial Court judge the opportunity for rehearing to alter the finality of the judgment. "The rule itself provides only two exceptions to the thirty day requirement: (1) if any party has filed a timely motion for new trial or (2) if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury." Besing v. Moffitt, 882 S.W. 2d 79, 81 (Tex. App. - Amarillo 1994). Other than these two exceptions, there are no other motions which allow the trial court judge the chance to reconsider his/her decision and prevent an unnecessary appeal.[3] The existing procedure necessarily leads to waste and do not promote judicial economy contrary to the objective of the Appellate Rules. "When a party elects to seek a rehearing there is always the possibility that the order complained of will be modified in a way which renders [appellate] review unnecessary." Marvin

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[3]**The Court of Appeals in *Chavez, supra*, at 527, in footnote No. 4, was uncertain as to whether any post-judgment motions extend the time to appeal; this incoherence creates uncertainty and risk of losing a client's claim because of the current conflict in the Rules.**

Stone v. Immigration and Naturalization Services, supra, 514 U.S. ___, 131 L. Ed 2d 465, 473 (1995) cf. Outland v. CAB. 284 F2d 224, 227 (CADC 1960). The Texas Rules do not allow said option; a motion for new trial is the only vehicle one can use, in particular where summary judgments are involved Besing, supra, p. 82, and Torres v. Western Casualty and Surety Company, 457 S.W.2d, 50, 51, (Tex. 1970). This procedure has caused several problems for practitioners. . For instance, when a practitioner reviews the Rules to file an appeal challenging the granting of a summary judgment, the practitioner is uncertain as to whether a motion for new trial is the proper choice to extend the timetable to appeal on a summary judgment because "[a] case is "tried" within the purview of the Rule when there is evidentiary hearing before the court upon conflicting evidence." Besing, supra. p. 81-82. However, the Texas Supreme Court has decided that "Though no "trial" was actually had, the trial court was entitled to receive and consider the motions as it did. A motion for new trial is not necessarily inappropriate following entry of summary judgment." Torres, supra, p. 51

This distinction as to what constitutes "tried" for motion for new trial and "tried" for purposes of findings of fact and conclusions of law in a summary judgment has caused inconsistent results. . . ." a summary judgment proceeding has not been tried" within the purview of Rule 296 or for the purpose of requesting findings of fact and conclusions of law." Besing, Supra, p. 81 cf. Zimmerman v. Robinson, 862 S.W. 2d 162, 164 (Tex. App. - Amarillo

1993, n.w.h.) How can a case be "tried" for one purpose and not for another? A trial is trial. Rule, 41(a)(1) is clearly inconsistent, irrational and easy to trap the average practitioner. "In short, the Rules of Appellate Procedure [must] evince a consistent and coherent view of the finality and appealability of district court judgments subject to post-trial motions." Stone, supra at 131 L. Ed 2d 465, 480. The interpretation of Rule 41(a)(1) falls short of this requirement: it is neither coherent nor consistent.

Such inconsistent distinctions confuse the practitioner. "[It] makes little sense and certainly places the practitioner in jeopardy if (s)he relies upon rule [296] only to have the rug pulled out from underneath by an appellate court's strict construction of Rule 41(a)(1)." Id. p. 526. "The confusion that would result from litigants divergent views of the completeness of proceedings would be wholly at odds with the imperative that jurisdictional requirements be explicit and unambiguous. Browder, supra p. 436 U.S. at 267. The lack of clarity in Rule 41(a)(1) has resulted in confusion. If the Texas Supreme Court has approved Motion for New trial in a summary judgment, when there was no "trial" why wouldn't a practitioner assume that a summary judgment is a case "tried" without a jury and believe that a request for Findings of Fact and Conclusions of Law are appropriate to extend the time to appeal to ninety days. The Texas Supreme Court can not take such a contradictory and inconsistent position: a trial can not be a trial for one purpose and not another.

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The United States Supreme Court addressed this particular concern in Missouri v. Jenkins, 495 U.S. 33, as follows:

> "We share respondent's concern about the stability and clarity of jurisdictional rules. It is undoubtedly desirable to have published rules of procedure giving parties fair warning of the treatment afforded petitions and suggestions for rehearing in banc. Regular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance."

"There is a paucity of cases considering this question." Indeed, we have found only two very recent cases in which the question was considered and, in those two cases, the cases came to different conclusions." Besing, supra p. 81. Although the court of appeals changed its opinion, the problem with inconsistent interpretation of Rule 41(a)(1) remains.

Moreover, the strict construction of Rule 41(a)(1) conflicts with the Texas Supreme Court's liberal approach. "We are fully cognizant of the policy that decisions of the court of appeal should turn on substance rather than procedural technicalities." Besing, supra, p. 82. Moreover, "these stand in stark contract to the liberal rule, also relied upon Linwood . . ." Chavez, supra, p. 528.

The Texas Appellate Rules are therefore, clearly deficient in that they do not accomplish what Appellate Rules

are supposed to do: allow the trial court the opportunity to alter, amend, reconsider, elaborate or withdraw his/her judgment. Moreover, Texas Courts are inconsistent in their construction of the Rules in that they are required to take a liberal approach and allow ". . . jurisdiction over an appeal if a party files an instrument in a bona fide attempt to invoke the jurisdiction of the appellate's court jurisdiction." Linwood, supra p. 103, but on the other hand, however, they will deprive a party of jurisdiction simply because the party mislabelled the motion or made an improper request to the court to elaborate on his/her judgment. "We believe that technical questions of what is a "trial" of whether any particular pleading actually serves to preserve questions for appeal and what a pleading is properly called, are irrelevant to the determination of what an appellate deadline runs." Chavez, supra, p. 418.

Technically a request for findings of fact and conclusions of law makes much more sense than a request for a Motion for new trial. Where a court renders summary judgment against the losing party.

In federal courts, a summary judgment, although not required by the courts, can be advisory for a Court of Appeals. "It is clear that under the amended rule the District Court is not required to make findings . . . "[t]his seems rather short-sighted objective . . .Findings may be helpful to the appellate court in making clear the basis for the trial court's decision and indicating what the court understood to be the undisputed facts on which the summary judgment

motion was granted." 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil 2d §2575.

Similarly, This Court has expressed support for issuance of findings of fact and conclusion of law in a summary judgment where the issues involved are complex. "The district court would be expected to furnish a statement of its reasons, including such findings of fact and conclusions of law as might be appropriate." U.S. v. Continental Oil Co., 377 U.S. 161, (1964). Moreover, "one case held it error to grant summary judgment without making findings of fact when there were complicated but undisputed facts warranting inconsistent inferences." 9A WRIGHT & MILLER, supra §2575. cf Winter Park v. Southern Bell, 181, F 2d 341 (5th Cir). "Conclusions of law could limit the scope of appeal and provide the appellate court with insight into the trial court's reasoning in granting a summary judgment as a matter of law." Chavez, supra, p. 417, footnote 1.

Similarly, in the case at bar, respondent requested summary judgment based on the Doctrine of Collateral Estoppel. It was granted. However, Petitioner could not determine on what undisputed facts and what legal principle the court relied on in granting summary judgment. (App. E).

Consequently, where the Court does not state its reasoning for granting summary judgment, in a case where complex legal doctrines such as collateral estoppel is involved, it is very difficult for Petitioner to prosecute the appeal. It is important, therefore, to allow the appellant the

opportunity to assail or ask, from the trial court, to elaborate in her/his judgment, in particular where complex issues are involved. "The reports are filled with cases in which litigants filed post judgment motions to "reconsider" to vacate "to set aside" or to re-argue adverse judgment the lower courts have almost without exception treated these as Rule 59 motions, regardless of their label." Griggs v. Provident Consumer, 459 U.S. 56, 68.

The Texas Court's interpretation of Rule 41(a)(1) is erroneous, therefore because it has inadvertently created confusion and inconsistency in that according to the State Court decisions, a case is "tried" before the bench for one purpose and but not for another. Moreover, The Rules, as written, do not accomplish what some appellate Rules are supposed to do: It creates judicial waste because trial courts cannot elaborate, alter, amend, reconsider or withdraw their judgments. Many conflicts have been created by the decision of the Texas Courts in respect to said Appellate Rule in that they have also created a third method of extending the timetable in instances where an appellant files an instrument, meaning filing of almost anything, in a "bona fide" attempt to invoke the appellate court's jurisdiction." Besing, supra, p. 81. This has created a very incoherent and inconsistent application of the Rules for practitioners. For instance, if a person fails to comply with the Appellate Rules, Texas Court may still find that the court has jurisdiction merely because s/he filed any instrument that was not required under the Rules. The Texas Court stated as follows:

> "These bona fide attempt cases all involved instruments which actually invoke appellate jurisdiction." See, Linwood, 885 S.W. 2d at 103. (holding notice of appeal filed when not authorized was a bona fide attempt to invoke appellate jurisdiction" Chavez, supra, at 526.

Now, why would the Texas Court allow a practitioner to perfect an appeal, and extend the timetable to ninety days where notice of appeal is not even authorized by the Appellate Rule! on the other hand, how can the Court state that findings of fact and conclusions of law in summary judgment does not constitute a bona fide attempt to invoke the appellate jurisdiction of the court when Rule 41(a)(1) allows the Petitioner to request findings of fact and conclusions of law in order to extend the timetable from 30 to 90 days to appeal; arguably, a request for findings of fact and conclusions of law in summary judgment may be improper; however, to dismiss the appeal for want of jurisdiction is a harsh and extreme penalty; it is clear that said attempt was not a "mala fide" attempt to invoke the jurisdiction of the court. The Texas Supreme Court recognized in Linwood, supra that "Linwood filed a request for findings of fact and conclusions of law in an attempt (emphasis added) to extend the appellate timetable. Tex R. App. p. 41(a)(1). Id. p. 103. When is an attempt to invoke the jurisdiction of the Court a "mala fide" attempt? Unquestionably, according to the Texas Court a request for findings of Fact and Conclusions of law in a summary judgment proceeding is deemed to be a "mala

fide" attempt since, they reasoned, that it does not invoke the jurisdiction of the court.

Petitioner exercised nothing but diligence in prosecuting the appeal; Petitioner has complied with the numerous appellate deadlines and requirements all the way from the inception of this appeal to this U.S. Supreme Court; it is a process that requires diligence and thoroughness. Petitioner made a timely request findings of fact and conclusions of law; every other prerequisite to perfect and prosecute the appeal has been filed timely. All the briefs have been submitted timely; oral argument was presented to the Court of Appeals on the merits of the summary judgment - Collateral Estoppel issue. This Court has frowned on dismissals at this stage of the game. "[T]he fact that in some cases (say, when briefing and argument already have been completed in the court of appeals) judicial economy may actually weigh against stripping the court of jurisdiction." Stone, 131 L. Ed. 2d 465, 486 (1995).

Thus, the Texas Supreme Court has created, although unintentionally, "highly technical rules"; [w]ith consistent rules, a [non-specialist] lawyer, . . . is less likely to lose his client's rights to appeal simply through inadvertence." Id. at 483. Petitioner has not been treated fairly in that the Appellate Rules have been strictly interpreted against her. This is contrary to the Court's consistent attempt to apply a liberal rule in jurisdictional issues. See, Linwood. The Appellate Rules, however, was not being strictly applied against Respondent. For instance, Respondent specifically

stated in his motion for extension of time to file brief before the Court of Appeals, that petitioner had properly perfected her appeal; Respondent failed to raise the jurisdictional issue; the Rule requires that a party contesting jurisdiction to raise it before the court within 30 days; Respondent waited more than six-months to file the motion to dismiss the appeal for Want of Jurisdiction. One can infer that Respondent waited until the six-months elapsed because Petitioner would be foreclosed from filing an appeal by writ of error pursuant to Tex. R. App. P. 45 which allows a petitioner the right to appeal through this method also. The court neglected to apply this requirement against the respondent which is mandatory under Rule 72 of Texas Appellate Rules: "motions to dismiss for Want of Jurisdiction . . .shall also be made within thirty days after filing of the transcript . . ." Here, respondent waited six months to raise the issue of jurisdiction.

Respondent requested several extensions to file the appellee's brief and not once did the issue of jurisdiction was raised as required by the Rule. A strict interpretation of the Rule would unavoidable result in the conclusion that Respondent had waived its right to contest jurisdiction six-months after the summary judgment had been signed by the trial Court. However, because of the State Court interpretation of Appellate Rule 41(a) in an inconsistent and incoherent manner, she will lose it all. This is not justice under any system of laws.

III. The Question Presented Is Important

The construction of Texas Appellate Procedure Rule 41(a)(1), is in conflict with the cases rendered by This Court. Recently, this Court reiterated this principle. "[T]he Rules of Appellate Procedure evince a consistent and coherent view of the finality and appealibility of District Court judgments subject to post-trial motions." Stone, supra, 480.

The Texas Court's interpretation of The Texas Rules of Appellate Procedure are inconsistent and clearly do not provide a coherent view to the non-specialist as when a judgment becomes final and what post-trial motions extend or toll the time to appeal from thirty to ninety days.

The State Supreme Court has not overruled Torres, supra, where a motion for new trial is appropriate and does extend the time to appeal from thirty to ninety days in a summary judgment even though technically the case was not "tried". It continues to be good law. The uncertainty and incoherence exist as to what post-trial Motion can be filed in a summary judgment to extend the appellate time table without being dismissed for want of jurisdiction.

More confusion is added when one considers that... Tex. R. Civ. P. 329b(g) provides that a Motion to modify, correct or reform a judgment shall extend both the trial courts plenary power and the time for perfecting an appeal in the same manner as a motion for new trial, Tex. R. App. P. 41(a)(1) provides that the appellate timetable is extended only by the filing of a Motion for New Trial or a request for findings of fact and conclusions of law.

The Rules are not only in conflict with Texas Rules of Appellant Procedure as expressed in Chavez, Supra, by the Texas Court of Appeals, but more importantly, they fail to satisfy the due process and Equal Protection requirements established by the United States Supreme Court.

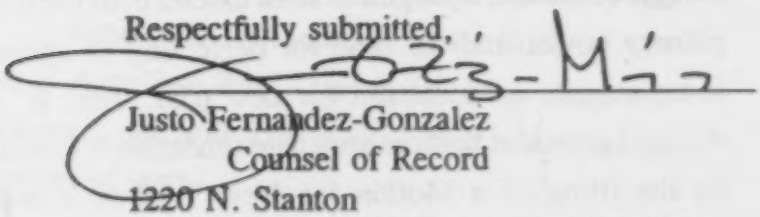
Justice Breyer articulated this concern in a recent opinion mainly that interpretations of statutes have to be done consistently. He stated as follows: "With consistent Rules, a [non-specialist] is less likely to lose his client's right to appeal simply through inadvertence." Stone, supra, at 483.

Such is the case in Petitioner's appeal. The Texas Rules are both in conflict with Texas Rules and United States Supreme Court precedent - They do not allow litigants the opportunity to be heard on the merits - all due to their incoherence and inconsistent interpretation of the Rules by the Texas Supreme Court. This case presents an opportunity for this Court to address the issue as to what due process requirements are States expected to provide in their statutes to comply with the requirement of the Due Process and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,



Justo Fernandez-Gonzalez
Counsel of Record
1220 N. Stanton
El Paso, Texas 79902 (915) 544-3022

APPENDIX "A"

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

November 22, 1995

Mr. Justo Fernandez-Gonzalez
El Paso Legal Assistance Society
1220 N. Stanton
El Paso, TX 79902

Mr. Edward W. Dunbar
Christie Berry & Dunbar
1700 North Stanton
El Paso, Texas 79902

RE: Case Number 95-0532

Style: ELFIDA CHAVEZ v. THE HOUSING AUTHORITY OF THE CITY OF EL PASO

Dear Counsel:

Motion for rehearing of application for writ of error in the above referenced cas was this day overruled.

Sincerely,

JOHN T. ADAMS, Clerk

by /S/
Courtland Crocker
Deputy

APPENDIX "B"

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

November 22, 1995

Mr. Justo Fernandez-Gonzalez
El Paso Legal Assistance Society
1220 N. Stanton
El Paso, TX 79902

Mr. Edward W. Dunbar
Christie Berry & Dunbar
1700 North Stanton
El Paso, Texas 79902

RE: Case Number 95-0532

Style: ELFIDA CHAVEZ v. THE HOUSING AUTHORITY OF THE CITY OF EL PASO

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by /S/
Courtland Crocker
Deputy

APPENDIX "C"

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ELFIDA CHAVEZ,	)	
	)	No. 08-93-00-422-Cv
Appellant,	)	
	)	Appeal from
v.	)	
	)	County Court al Law No.2
HOUSING	)	
AUTHORITY OF	)	of El Paso County, Texas
THE CITY OF	)	
EL PASO,	)	(TC#91-J00034-2)
	)	
Apellee.	)	

OPINION ON MOTION FOR REHEARING

NATURE OF THE CASE

Appellant Elfida Chavez appealed an adverse jury verdict in a forcible entry and detainer case by trial de novo to the county court at law. The county court at law granted summary judgment in favor of the El Paso Housing Authority ("EPHA") and Chavez appealed to this Court. Appellant's Motion for Rehearing is granted; we withdraw our opinion of March 9, 1995 and substitute the following. We dismiss the appeal for want of jurisdiction.

PROCEDURAL STATEMENT OF FACTS

The county court at law granted summary judgment

on June 28, 1993. Chavez filed a request for findings of fact and conclusions of law July 19, 1993, and a notice of past due findings of fact and conclusions of law on August 13, 1993. Her cash deposit in lieu of cost bond on appeal was filed with the district clerk on September 27, 1993.

EPHA moved to dismiss Chavez' appeal for want of jurisdiction on February 1, 1994. We denied EPHA's motion in a published opinion. *Chavez v. Housing Authority*, 876 S.W. 2d 416 (Tex.App.--El Paso 1994, no writ). Having determined that our prior opinion has been implicitly overruled by a subsequent Supreme Court decision, we revisit the jurisdictional issue *sua sponte*.

EXTENSION OF APPELLATE TIMETABLE

Texas Rules of Appellate Procedure, Rules 40 and 41 establish the process for perfecting an appeal. The normal process for the perfection of a civil appeal is the filing of a cost bond, cash deposit, or affidavit of inability to pay costs on appeal, and giving notice thereof to all other parties. It is the timetable for the filing of these documents which becomes critical in this case. "When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party **of if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury.**" [Emphasis added]. TEX. R. APP. P. 41(a)(1). In the instant cause, Chavez filed a timely request for findings and

conclusions; she filed no motion for new trial.

The emphasized provision in TEX. R. APP. P.41(a)(1) clearly relates to TEX.R.CIV.P.296, which only entitles a party to findings of fact and conclusions of law in cases "tried in the district or county court without a jury." A case is "tried" when there is an evidentiary hearing before the court upon convlicting evidence. *Besing v. Moffitt*, 882 S.W.2d 79 (Tex.App.--Amarillo 1994, no writ); *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex.App.--Tyler 1992, no writ). Any other interpretation would "ignore the clear and concise language of rule 41(a)(1) and render the word 'tried' meaningles." *Zimmerman v. Robinson*, 862 S.W. 2d 162, 164 (Tex.App.--Amarillo 1993, no writ). Thus findings of fact are appropriate only in those circumstances in which the trial court is called upon to determine questions of fact. *Besing*, 882 S.W.2d at 82; *City of Grand Prairie v. City of Irving*, 441 S.W.2d 270, 273 (Tex.Civ.App.--Dallas 1969, no writ). When a trial court grants summary judgment relief, it determines that there is no genuine issue of material fact, so that a summary judgment proceeding has not been "tried" within the scope of Rule 296 or for the purpose of requesting findings of fact and conclusions of law. *Besing*, 882 S.W.2d at 82; *Zimmerman*, 862 S.W.2d at 164.

Our prior ruling in this case upon EPHA's motion to dismiss considered and rejected these same arguments, concluding instead that the timeliness of a post-judgment motion rather than its content or effectiveness should control the extension of appellate deadlines. *Chavez*, 976 S.W.2d at

417. however, seven months after our opinion issued, the Texas Supreme Court squarely addressed the subject in *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994), holding that "[b]ecause findings of fact and conclusions of law have no place in a summary judgment proceeding, the [appellate] timetable was not extended." That Court's ruling is premised upon a construction of the language in Rule 41(a)(1) that "tried without a jury" does not include a summary judgment proceeding. We are accordingly bound by the *Linwood* decision.[1] In the instant cause, no timely

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[1]**It is logical to note that based upon the definition of "trial" as contained in *Linwood* and *Besing*, a summary judgment proceeding has not been "tried" for purposes of a motion for new trial, either. Although the Supreme Court has noted that a motion for new trial is not necessarily inappropriate following entry of a summary judgment despite the fact that no "trial" was actually had, *Torres v. Western Casualty and Surety Company*, 457 S.W.2d 50 (Tex. 1970), that case and its progeny pre-date *Linwood*. If findings of fact and conclusions of law are inappropriate to extend the appellate timetable because a summary judgment does not constitute a "trial", we are hardpressed to understand how a motion for new trial is any more appropriate. We are left, then, with the question of whether the appellate timetable may ever be extended following summary judgment. Available options would appear to be motions to correct, reform, modify, or vacate the judgment. TEX.R.CIV.P. 329b(d) Yet while TEX.R.CIV.P. 329b(g) provides that a motion to modify, correct or reform a judgment shall extend both the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial, TEX.R.APP.P. 41(a)(1) provides that the appellate timetable is extended only by the filing of a motion for new trial or a request for findings of fact and conclusions of law. Thus, the Rules are in apparent conflict. The concept of opening the window to allow additional time for perfecting appeal arises no doubt from the intention that a trial court have the ability to alter or withdraw its judgment during its plenary power. To extend the trial court's**

motion for extension of time to file a cash deposit or appeal bond was filed. Absent that, Chavez' attempted appeal is a nullity which necessitates dismissal from the Court's docket. *Wilcox v. Seelbinder*, 840 S.W.2d 680, 683 (Tex.App.--El Paso 1992, writ denied). We therefore conclude that this appeal was not timely perfected and this Court has no jurisdiction to address the merits of the case.

BONA FIDE ATTEMPT TO INVOKE APPELLATE JURISDICTION

At oral argument on the merits, Chavez asserted that her request for findings of fact and conclusions of law was a bona fide attempt to invoke appellate jurisdiction. *See, e.g., Linwood*, 885 S.W.2d at 103; *City of San Antonio v. Rodriguez*, 828 S.W.2d 417, 418 (Tex. 1992)(per curiam); *Mueller v. Saravia*, 826 S.W.2d 608, 609 (Tex. 1992)(per curiam); *Grand Prairie Independent School Dist. v. Southern Parts Imports, Inc.*, 813 S.W. 2d 499, 500 (Tex. 1990)(per curiam); *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 580-81 (Tex. 1989). We disagree that a request for findings and conclusions constitutes an attempt to invoke appellate jurisdiction. The mere filing of a Rule 296 request

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plenary power to a maximum of 105 days while requiring perfection of appeal within 30 days makes little sense and certainly places the practitioner in jeopardy if (s)he relies upon Rule 329b only to have the rug pulled out from underneath by an appellate court's strict construction of Rule 41(a)(1). We do not believe that such a hypertechnical approach fosters either justice of judicial economy. However, until these Rules are harmonized or definitevely construed by the Supreme Court, we advise caution.

does not invoke the jurisdiction of a court of appeals. Appeal bonds, notices of appeal, or affidavits of inability to pay costs on appeal, filed with the clerk of the trial court, invoke the jurisdiction of a court of appeals. TEX.R.APP.P. 40(a)(1)-(2); *see El Paso Sharky's Billiard Parlor, Inc. v. Amparan*, 831 S.W.3d 3, 4 (Tex.App.--El Paso 1992, writ denied). This distinction is significant in light of *Linwood* and the authorities addressed therein. These "bona fide attempt" cases all involved instruments which actually invoke appellate jurisdiction. *See, e.g., Linwood*, 885 S.W.3d. at 103 (holding notice of appeal filed when not authorized was a bona fide attempt to invoke appellate jurisdiction); *City of San Antonio*, 828 S.W.2d at 418 (holding a notice of appeal filed in the wrong cause number was a bona fide attempt to invoke appellate jurisdiction); *Grand Prairie Independent School Dist.*, 813 S.W.2d at 500 (holding notice of appeal filed when not authorized was a bona fide attempt to invoke appellate jurisdiction); *Walker*, 776 S.W.2d at 581 (holding affidavit of inability to pay costs on appeal substantially complied with requirements, and was sufficient to invoke appellate jurisdiction). While the Supreme Court's opinion in *Mueller*, 826 JW.W.2d at 609 speaks in terms of a motion for new trial filed under an incorrect cause number as constituting a bona fide attempt to invoke appellate jurisdiction, the facts of the case indicate the true import of the decision--under the peculiar facts of the case, the motion was properly filed so that the appellate timetable had been extended and the appeal

timely perfected.[2] *Mueller* may more appropriately be construed as addressing a bona fide attempt to extend a trial court's jurisdiction over its own judgment since a motion for new trial does not in and of itself invoke an appellate court's jurisdiction. If properly filed, a motion for new trial merely extends the time frame in which an appeal may be perfected. Stated another way, an improperly filed motion for new trial will not extend the appellate timetable and an appeal perfected outside the thirty day window will be dismissed for want of jurisdiction. It follows that the same result should occur with an improper request for findings and conclusions.

It is clear from these cases that errors in the instrument filed to perfect an appeal, and minor errors in the filing itself, do not deprive this Court of jurisdiction. Material errors as to the timing of a perfection, however, do deprive this Court of jurisdiction. *El Paso Sharky's Billiard Parlor, Inc.*, 831 S.W.2d at 4.

Chavez filed her cash deposit attempting to perfect her appeal ninety-one days[3] after summary judgment was signed.

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[2]**The Supreme Court carefully distinguished the facts in *Mueller* from *Philbrook v. Berry*, 683 S.W.3d 378, 379 (Tex. 1985)(orig. proceeding)(per curiam) in which the Court had held that when a motion for new trial is filed in a cause not containing the judgment which the motion assails, the court's plenary power over its judgment is nto extended beyond the thirty days prescribed by TEX.R.CIV.P. 329b(a). The *Mueller* opinion "assum[ed] that *Philbrook* was properly decided" and did not purport to overrule it either implicitly or explicitly.**

[3]**The ninetieth day fell on Sunday.**

There was no motion for new trial, motion to reconsider, or motion to vacate, correct, modify, or reform judgment filed such that her cash deposit was due within thirty days of the signing of judgment. TEX.R.APP.P. 41(a)(1).[4] Therefore, this Court has no jurisdiction of Chavez' appeal because it was not timely perfected by the filing of acost bond, cash deposit, or affidavit of inability to pay costson appeal.

OPPORTUNITY TO AMEND

We are not unmindful of the Supreme Court's direction in *Grand Prairie*, 813 S.W.2d at 500 and *Linwood*, 885 S.W.2d at 103 that before dismissing an appeal, a court of appeals should give the putative appellant an opportunity to correct her error. In both of those cases, however, the appellant had timely but incorrectly filed a notice of appeal in lieu of a cost bond. The error could thus be remedied. In the instant case, no document designed to invoke appellate jurisdiction was filed within the thirty day window and the error is accordingly incurable.

CONCLUSION

We hold that a request for findings of fact and conclusions of law after summary judgment is rendered is not a bona fide attempt to invoke appellate jurisdiction. Because

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[4]We do not here decide whether a timely filed motion for new trial or motion to reconsider, vacate, correct, modify or reform the judgment would have extended the appellate timetable as that issue is not presently before us.

there has been no bona fide attempt to invoke appellate jurisdiction, the appeal must be dismissed, and this Court's prior opinion in this case, *Chavez v. Housing Authority*, 876 S.W.2d 416 (Tex.App.–El Paso 1994), no writ), is overruled.

April 13, 1995 EN BANC

Barajas, C.J., Larsen, McClure, and Chew, JJ.
Larsen, J., concur

(Publish)

CONCURRING OPINION ON REHEARING

I agree with the Court that we are bound by the holding in **Linwood v. NCNB Texas,** 885 S.W.2d 102 (Tex. 1994), and that a request for findings of fact and conclusions of law will not extend the running of the appellate deadline. For the reasons set out in our pre-**Linwood** opinion on motion to dismiss in this appeal, however, I wish to express my disagreement with the Supreme Court's reasoning in that case. **See Chavez v. Housing Authority of the City of El Paso**, 876 S.W.2d 416, 417-18 (Tex.App.-El Paso 1994), no writ). It would be more consistent and rational to treat all post-judgment pleadings seeking to assail that judgment, or seeking elaboration on it, as extending appellate deadlines. In my view, the technical questions of what legal effect a motion might have, whether "a trial" has been held, or what

a pleading is most appropriately named, serve only to create technical pitfalls. These stand in stark contract to the liberal rule, also relied upon in **Linwood**, that any "bona fide attempt" at perfecting appeal invokes the appellate court's jurisdiction. If there is a sound reason for this distinction, it escapes me. Nevertheless, the Supreme Court opinion binds us. I concur.

April 13, 1995 /s/ SUSAN LARSEN
SUSAN LARSEN, Justice

APPENDIX "D"

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ELFIDA CHAVEZ,	)	
	)	
Appellant,	)	No. 08-93-00422-CV
	)	
v.	)	Appeal from
	)	
THE HOUSING	)	
AUTHORITY OF THE	)	County Court at Law #2
CITY OF EL PASO,	)	
	)	of El Paso County, Texas
Appellee.	)	(TC# 93-J00034-2)

OPINION ON MOTION

Appellee, Housing Authority of the City of El Paso, has filed its motion to dismiss for want of jurisdiction. It claims that because this case was disposed of by summary judgment, Appellant's request for findings of fact and conclusions of law was inappropriate and did not extend appellate deadlines under Tex.R.App.P. 41(a)(1). This appears to be a question of first impression. We find that Appellant's request, even if lacking other legal effect, did act to extend the filing deadlines.

RULE 41(a)(1)

Before 1990, a request for findings of fact and conclusions of law did not extend Appellant's deadline for perfecting the appeal. In that year, the Supreme Court amended the applicable rule to provide:

> [T]he [appeal] bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. TEX.R.APP.P. 41(a)(1). [Emphasis added].

In support of its claim that the rule does not apply here, the Housing Authority cites cases holding that summary judgment is not a "trial" on the merits, and holding that findings of fact and conclusions of law have no place in a summary judgment proceeding.[1] **Richards v. Allen**, 402 S.W.2d 158, 161 (Tex.

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[1]**Although it is clear that findings of fact are not appropriate in summary judgment cases, we see no reason that conclusions of law may not be requested in summary judgment situations. See Samaniego v. El Paso Towing, Inc., 836 S.W.2d 702, 704 (Tex.App.–El Paso 1992, writ denied). Conclusions of law could limit the scope of appeal and provide the appellate court with insight into the trial court's reasoning in granting judgment as a matter of law. Although we have not seen this vehicle used i this fashion, we see nothing in the**

1966); **Fulton v. Duhaime**, 525 S.W.2d 62, 64 (Tex.Civ.App.--Houston [1st Dist.] 1975, writ ref'd n.r.e.). It urges, therefore, that because there are no factual disputes to resolve in a summary judgment proceeding, Appellant's request was of no legal consequence and cannot extend time for filing an appeal. We disagree for two reasons.

First, we believe this situation is analogous to those where court of appeals have found that defective motions for new trial, although preserving nothing for review, nevertheless extend time for perfecting an appeal. **Vasquez v. Carmel Shopping Center Co.**, 777 S.W.2d 532, 534, (Tex.App.--Corpus Christi 1989, writ denied) ("the appellate timetable will be extended if a timely motion for new trial has been filed. These rules do not require compliance with TEX.R.CIV.P. 321 and 322, and they do not exclude cases resolved by summary judgment."); **Neily v. Aaron**, 724, S.W.2d 908, 911 (Tex.App.--Fort Worth 1987, no writ) (same). These cases focus on the timeliness of the post-judgment motion, rather than on its content or effectiveness, indetermining whether it extended deadlines imposed by the appellate rules. We see no reason why this approach should not apply to erroneous requests for findings of fact and conclusions of law, as well.

Second we note that, strictly speaking, neither a motion for new trial nor a request for findings of fact and

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rules or caselaw precluding it. For this reason, too, we believe that Appellee's request here was adequate to extend her deadline for perfecting appeal.

conclusions of law is the proper post-judgment filing in a summary judgment case. A motion for reconsideration is probably the most accurate label for a losing party's request in this situation, but the rules of appellate procedure do not mention such a pleading. Thus, a literal reading of TEX.R.APP.P. 41 would preclude any extension of appellate deadlines in summary judgment cases. We do not believe this is a result intended, nor do we believe the rule has been interpreted that way in the past. We also note that timely filed motions to reinstate, although not specifically mentioned in Rule 41, extend appeal deadlines as do motions for new trial. **Butts v. Capitol City Nursing Home, Inc.**, 705 S.W.2d 696, 697 (Tex. 1986). It seems clear, therefore, that the name of a motion should not control its effect under Rule 41.

CONCLUSION

In sum, we believe that the label given a post-judgment pleading is not a proper focus in deciding whether it extends the timetables set out in TEX.R.APP.P. 41(a)(1). Rather, if the pleading either assails the judgment entered, or (after a judgment by the Court without a jury) requests that the trial court elaborate on the judgment, factually or legally, that is sufficient to enlarge the time for perfecting the appeal under TEX.R.APP.P. 41(a)(1). We believe that technical questions of what is a "trial," of whether any particular pleading actually serves to preserve questions fore appeal and of what a pleading is most properly called, are irrelevant to a determination of when an appellate deadline runs. We

believe that the Texas Rules of Appellate Procedure (despite their acronym) should not serve as pitfalls for the unwary, but should be interpreted, if possible, to avoid jurisdictional dismissals on technical grounds. **See Harris County Hospital District v. Estrada,** 831 S.W.2d 876, 878 (Tex.App.–Houston [1st Dist.] 1992, no writ).

We therefore hold that Appellee's timely request for findings of fact and conclusions of law extended her time for filing the appeal bond, or affidavit in lieu, until ninety days after the summary judgment was signed. Appellant Housing Authority's motion to dismiss for want of jurisdiction is denied.

March 3, 1994 PER CURIAM

Before Panel No.3
Barajas, C.J., Larsen and McCollum, JJ.

(Publish)

APPENDIX "E"

IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

HOUSING AUTHORITY OF THE CITY OF EL PASO	)	
Plaintiff	)	
vs.	)	NO. 91-J00034-2
ELFIDA CHAVEZ	)	
Defendant	)	

ORDER GRANTING SUMMARY JUDGMENT

Came on to be considered Plaintiff's Motion for Summary Judgment on the 23th day of June, 1993, and the Court, having reviewed the pleadings and exhibits of the parties, is of the opinion said motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that Summary Judgment be granted in favor of Plaintiff.

SIGNED this _____ day of June, 1993.

_____
JUDGE

Supreme Court, U. S.
FILED
MAR 25 1996
CLERK

No. 95-1344

In The

Supreme Court of the United States

October Term, 1995

ELFIDA CHAVEZ,

Petitioner,

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state rule of procedure, consistent with constitutional safeguards, exclude, as a mechanism to extend the time within which to perfect an appeal, a request for findings of fact and conclusions of law in the context of a summary judgment proceeding.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Housing Authority of the City of El Paso (EPHA), Respondent herein, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioner's appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS INVOLVED

(a) Appeals in Civil Cases.

(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond or affidavit in lieu shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely

> filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.
>
> Tex. R. App. P. 41(a)(1).

STATEMENT OF THE CASE

This is an eviction case. Elfida Chavez is a lessee of an apartment owned by EPHA. The parties have been involved in forcible detainer and related proceedings since 1991.

The original action, filed in the justice of the peace court, was interrupted by a challenge in federal court to a housing authority lease provision. The challenge was directed to a portion of the lease required by federal regulation to be implemented by all public housing authorities.

The lessee was obligated "to conduct himself and cause other persons who are on the premises with his consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe, and sanitary condition; [and] to refrain from illegal or other activity which impairs the physical or social environment of the project." 24 C.F.R. §966.4(f)(11), (12). The EPHA lease contained a corresponding provision, and satisfied both 24 C.F.R. §966.4 and 42 U.S.C. §1437d(1)(5).

Chavez' suit, which claimed infringement upon association generally and family relationships in particular,

failed. *Chavez v. Housing Authority*, 973 F.2d 1245 (5th Cir. 1992). In the litigation a variety of factual findings had been made by the trial court and affirmed by the court of appeals. The findings related to the violent and criminal activities of her son on EPHA property.

When the federal proceedings were concluded and the matter returned to the state forum, a motion for summary judgment was filed by EPHA. The motion asserted that various factual matters had been determined in the federal courts, and that the doctrine of collateral estoppel or issue preclusion should be applied. The state trial court granted the motion for summary judgment.

Chavez then requested findings of fact and conclusions of law on July 19, 1993. None were made by the trial court. Chavez later appealed to the intermediate state appellate court, and EPHA maintained that the appeal was untimely because the deadline to appeal had not been extended. After initially ruling against EPHA, the court reconsidered, and granted EPHA's motion to dismiss.

The trial court's order granting summary judgment was signed on June 28, 1993. Under Texas practice, an appeal must be perfected within thirty (30) days of the signing of the judgment, unless extended. Tex. R. App. P. 41(a)(1). A certificate of deposit in lieu of cash was filed by Chavez with the clerk on September 27, 1993. If timely, this would have perfected the appeal, but it was well beyond the thirty (30) day period.

At issue in the court below was whether Chavez took any of the necessary steps to extend the time period. This

could have occurred by either filing a motion for new trial or by requesting findings of fact and conclusions of law had the case been tried without a jury. Rule 41(a)(1).

The appeal was dismissed because the timelines could not be extended, under the state rule, by a request for findings of fact and conclusions of law in a summary judgment case. A "trial" did not occur in the manner required by Rule 41(a)(1).

The issue for the state appellate court was whether the request for findings and conclusions extended the timelines in the context of a summary judgment proceeding. Stated more narrowly, the issue was whether a summary judgment hearing could be defined as a matter "tried without a jury," and, therefore, a mechanism by which to extend time. The court answered in the negative.

Chavez then unsuccessfully sought a writ of error in the Texas Supreme Court. From this denial, Chavez now seeks redress in the United States Supreme Court.

REASONS TO DENY THE WRIT

Chavez was entitled to a "fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1965). The presence of such fundamental fairness in a judicial proceeding satisfies any due process claim.

Chavez' claim does not go to whether the overall hearing procedure was adequate to protect a private interest. There is no assertion that (1) adequate notice was not received; (2) the decision maker was not neutral; (3)

the opportunity to make an oral presentation to the decision maker was denied; (4) the right to present evidence or witnesses was abridged; (5) the right to cross-examine witnesses was denied; (6) legal counsel was denied; or (7) the decision not based on the record. The traditional safeguards to insure a fair trial were honored in the trial of Chavez' case.

The eviction proceeding and subsequent appeal afforded Chavez the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965). Notice was given and time to prepare for trial was afforded. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950); *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410 (1900). The opportunity to confront and cross-examine adverse witnesses was not compromised. *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959). The decision rested solely on the evidence adduced at trial, *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), and Chavez was represented by legal counsel. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). Trial and appeal were before judges who were impartial, and had no direct or substantial pecuniary interest in reaching a decision against Chavez. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927).

Chavez' complaint is directed to a single civil appellate rule which is said to violate both her due process and equal protection rights. As stated above, Chavez requested findings of fact and conclusions of law in a summary judgment proceeding. Rule 41(a)(1) states that such a request may be made "in a case tried without a jury." Nothing connected with a summary judgment

involves a trial to the court in regard to weighing facts. Indeed, the entire procedure presumes an absence of material facts.

The issue determined by the Texas Eighth Court of Appeals, sitting in El Paso, was whether the request made by Chavez extended the appellate timetable. The court held that the timetable was not extended. In reaching this decision, the court applied the then recent Texas Supreme Court of *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994). The holding in *Linwood* was unequivocal: because findings of fact and conclusions of law have no place in a summary judgment proceeding, a request for them does not extend the appellate timetable. The reference in Rule 41(a)(1) to cases "tried without a jury" did not include summary judgment hearings.

The holdings of the Texas Supreme Court and the El Paso Court of Appeals were not unpredicted. Several courts, including the Texas Supreme Court, had stated, well before the case at hand, that findings of fact had no place in state summary judgment procedures. *State v. Easley*, 404 S.W.2d 296, 297 (Tex. 1966); *KT Bolt Mfg. Co. v. Texas Elec. Coop., Inc.*, 837 S.W.2d 273, 274 n.1 (Tex.App. – Beaumont 1992, writ denied); *Robbins v. Warren*, 782 S.W.2d 509, 511 (Tex.App. – Houston [1st Dist.] 1989, no writ).

Still another state court of appeals had held that findings of fact and conclusions of law were permissible in state practice only in a case tried on the merits. *State Farm Fire & Casualty Co. v. Reed*, 826 S.W.2d 659, 661 (Tex.App. – Houston [14th Dist] 1992), *aff'd*, 873 S.W.2d 698 (Tex. 1993). The Houston court held that the review of

docket entries were "especially inappropriate" in a summary judgment proceeding "because it would be reviewing them as if they were findings of fact and conclusions of law." *Id.*

Moreover, another Texas procedural rule directly states that findings of fact and conclusions of law are to be employed in cases "tried in district or county court without a jury." Tex. R. Civ. P. 296. A case may be said to be "tried" when conflicting evidence is presented in an evidentiary hearing. *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex.App. – Tyler 1992, no writ). A contrary interpretation would "ignore the clear and concise language of rule 41(a)(1) and render the word 'tried' meaningless." *Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex.App. – Amarillo 1993, no writ).

Chavez, accordingly, cannot claim to have been surprised by the ultimate holding by the El Paso court. Prior case law, as well as the rules themselves, indicated that she should have, and could have, extended the timelines in a different manner.

While the corresponding federal rules have been interpreted somewhat differently, they nonetheless make it clear that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule." Fed. R. Civ. P. 52. Federal appellate courts, on occasion, have directed trial courts to give specific factual indications as to why unclear summary judgments were granted. *U.S. v. Woods*, 885 F.2d 352 (6th Cir. 1989); *Myers v. Gulf Oil Corp.*, 731 F.2d 281 (5th Cir. 1984). Formal findings and conclusions, however, are still not

required, and, indeed, the rule states they are unnecessary. *Stewart v. U.S.*, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 432 (1984).

Reference to the federal procedural approach to findings of fact and conclusions of law is made to emphasize that findings and conclusions, in both state and federal practice, are designed to set out the reasons for a decision in a contested trial without a jury. By its very definition, a summary judgment in either the state or federal forum, if granted, can have no facts to find because there is an absence of contested facts.

While the federal and state rules may be similar, nothing requires them to parallel one another or to be interpreted in an identical fashion. Texas and the other states may regulate their own judicial procedures, according to their respective concepts of fairness, unless a procedure offends fundamental fairness. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299 (1930); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69 (1931).

Chavez was not denied the right to appeal. The method perfecting an appeal in Texas is to post a cost bond or affidavit within thirty (30) days after the judgment is signed. Tex. R. App. P. 41(a)(1). Late filing is permitted within fifteen (15) days after the last day allowed if a motion is made reasonably explaining the need for an extension. Rule 41(a)(2).

If a motion for new trial is made or if findings of facts and conclusions of law are requested in a non-jury trial, the time to perfect the appeal is extended to ninety (90) days from the date judgment was signed. Rule 41(a)(1). Chavez made no motion for new trial and improperly

asked for findings and conclusions. No extension occurred. She made no motion to extend time for good cause shown. She had thirty (30) days within which to perfect her appeal and failed to do so.

Chavez argues that the Texas Supreme Court's interpretation of its own rule is erroneous. Assuming *arguendo* that the court changed or altered the existing rule adversely to Chavez, her argument still should fail. A litigant does not have a vested right in any given mode of procedure. *Denver & R. G. W. R. Co. v. Brotherhood of R. R. Trainmen*, 387 U.S. 556, 87 S.Ct. 1746 (1967); *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679 (1972); *Congress of Racial Equality v. Town of Clinton*, 346 F.2d 911 (5th Cir. 1964). Chavez had no vested right to appeal in a certain manner.

Chavez' unsuccessful appeal cannot, without more, be considered as evidence that due process was violated. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S.Ct. 185 (1937). Due process is not a guarantee of a correct or consistent decision. *Id.* It certainly does not guarantee a favorable outcome.

The procedures concerning civil appeals in Texas are designed to allow litigants access to judicial review without undue difficulty. Requiring timely adherence to the rules is not unreasonable, and passes constitutional muster.

The timely filing of a cost bond or equivalent "is a necessary and jurisdictional step in perfecting an appeal." *Davies v. Massey*, 561 S.W.2d 799, 801 (Tex. 1978) (orig. proceeding); *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 742 (Tex.App – Houston [1st Dist.] 1992, writ

denied). The time period for filing a cost bond is jurisdictional. *Wadkins v. Diversified Contractors*, 714 S.W.2d 136, 137 (Tex.App. – Houston [1st Dist.] 1986, no writ). When an appeal is not timely perfected, the appellate court does not have authority to entertain the appeal. *McDonald v. Newmyer*, 775 S.W.2d 652, 653 (Tex.App. – Houston [1st Dist.] 1989, writ denied).

A state court of appeals, however, does have jurisdiction over an appeal "if a party files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction." *Linwood v. NCNB Texas*, 885 S.W.2d at 103. This holding reflects a long line of decisions of the Texas Supreme Court "that an appellant should be given an opportunity to amend a defective bond, a cash deposit in lieu of bond or an affidavit of inability before the court of appeals may dismiss the appeal." *Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) citing *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 560, 569 (Tex. 1975) (deposit in lieu of bond); *United Ass'n of Journeymen & Apprentices v. Borden*, 160 Tex. 203, 206, 328 S.W.2d 739, 741 (1959) (appeal bond); *Commercial Credit Corp. v. Smith*, 143 Tex. 612, 616, 187 S.W.2d 303, 365 (1945) (affidavit of inability to post bond); *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 581-82 (Tex. 1989) (affidavit of inability to post bond and deposit rent).

The problem in the case at bar is that Chavez filed nothing, defective or otherwise, indicating the intention to appeal. An instrument which extends a timeline in certain circumstances is not an invocation of the actual appellate process.

The earlier Texas cases are best summed up by *Woods Exploration*, 528 S.W.2d at 570, a case that dealt with the predecessor of Tex. R. App. P. 46(f):[1]

> This rule is liberally construed and applied to carry out its intended purpose. If the appellant files any sort of instrument that is intended to be a bond and to invoke appellate jurisdiction, the instrument may, on timely request, be amended to cure any defect of either form or substance.

This same test has been repeated in *Borden*, 328 S.W.2d 741; *Walker*, 776 S.W.2d at 581; *Grand Prairie Indep. School Dist.*, 813 S.W.2d at 500; and *Linwood*, 885 S.W.2d at 103. This is hardly the stuff of an inflexible system discouraging appeals.

In the case at bar, nothing was filed during the thirty (30) days after the judgment except the improper request for findings of fact and conclusions of law. No bond, affidavit, notice of appeal or bond substitute was filed. If some defective instrument, in the nature of a bond or substitute, had actually been filed, an argument in favor of jurisdiction could be made under *Linwood* and the cases cited above. Chavez has no such argument, and could make none in the Texas courts.

---

[1] Rule 46(f) states: "On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.

In *Linwood*, the appellant incorrectly filed a notice of appeal, rather than a bond, within the thirty (30) day period after judgment; in *Grand Prairie Indep. School Dist.*, the appellant also timely filed a defective notice of appeal; and in *Walker*, the appellant filed an incomplete affidavit of inability to pay costs and failed to meet other rules regarding evictions. The fundamental point in these, and the other cases discussed herein, is that **something** was timely filed that indicated an appeal was desired. In the words of Justice Nathan Hecht of the Texas Supreme Court, "a cost bond, even if defective, is sufficient to confer jurisdiction upon the appellate court as long as the instrument may be said to be a bond." *Walker*, 776 S.W.2d at 581.

A request for findings of fact and conclusions of law does not invoke appellate jurisdiction. The findings and conclusions, once made, are analogous to a jury verdict, and have the same force and effect. *Williams v. Planters' & Mechanics' National Bank*, 91 Tex. 651, 45 S.W. 690 (1898); *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App. – San Antonio 1987, no writ). While a proper request for findings and conclusions will extend the appellate timetable, Tex. R. App. P. 41(a)(1), no Texas case ever has equated a request for findings and conclusions with appellate jurisdiction. Indeed, without filing an appeal bond under Tex. R. App. P. 40, the appellate court would never be aware that a request had been made, or that findings and conclusions had been rendered. A request, if properly made, merely gives the requestor additional time to perfect an appeal. It lays the groundwork upon which an appeal may be later based. It does not manifest the intention to appeal.

The filing of a request for findings and conclusions cannot be equated with a bond or bond substitute. The request, in sum, is not an "instrument [that] may be said to be a bond." *Walker*, 776 S.W.2d at 581.

Without an extended timetable, the only colorable argument Chavez could assert to the state courts was that the request for findings and conclusions itself was an instrument filed in a bona fide attempt to invoke appellate jurisdiction. This is not what the *Linwood* line of cases has held, and was rejected in the state appeal. A bond or substitute was required to be filed in a timely manner, after which, if the instrument was defective, Chavez could have corrected or amended the instrument. It would have been erroneous to expand the *Linwood* holding to include a request for findings and conclusions within the definition of appellate instruments. Certainly, no constitutional right is implicated in the *Linwood* holding or the application of same.

It was clear to the intermediate state appellate court after the issuance of *Linwood*, 885 S.W.2d at 103, that the timetable was not extended. The express language of *Linwood* lends itself to no other interpretation: unless the deadline is extended, a bona fide attempt to appeal must be undertaken within thirty (30) days. During this time period no act was taken to invoke appellate jurisdiction. The appeal was correctly dismissed.

CONCLUSION

The method by which litigants in the Texas court system may appeal adverse decisions is reasonable and consistent. The time limitations are well defined and easily calculated. Rule 41(a)(1) extends the time within which to appeal in clearly set out circumstances. Chavez was charged with knowledge of the rules regarding deadlines and extensions. Prior reported opinions additionally gave every indication that the appellate timetable would not be extended in the manner undertaken by Chavez. No constitutional right was implicated when the subject rule was enforced in accordance with its terms. For these and the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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